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No. 923

# In the Supreme Court of the United States

October Term, 1959

ORAL WILKINSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. 12-14) is not yet officially reported.

### JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1960. (Pet. 12.) The petition for a writ of certiorari was filed May 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the ten day period within which an appeal may be taken in a criminal case runs from the date of the "entry of the judgment", as set forth in Rule 37(a)(2) of the Federal Rules of Criminal Procedure, rather than from the date of notice thereof to the petitioner, made in conformity with the district court's practice of mailing copies of formal judgments to defense attorneys.

## RULE INVOLVED

Federal Rules of Criminal Procedure:

> RULE 37. TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI
>
> (a) *Taking Appeal to a Court of Appeals.*
>
> * * * *
>
> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, * * *.
>
> * * * *

## STATEMENT

The petitioner was tried and convicted on a three-count indictment charging wilfully attempted tax evasion. He appeared in open court with counsel on January 4, 1960, and was sentenced to serve a term of six months and to pay fines totaling $15,000. The formal document of judgment and commitment was filed with the clerk on January 6, 1960, and was entered on the docket on January 7, 1960. Pursuant to the practice of the United States District Court for the

District of Utah, a certified copy of the judgment and commitment was mailed to the petitioner's counsel and was received by him sometime during the work week of January 11-15, 1960. A notice of appeal was filed on January 21, 1960. (Pet. 13.)

On February 18, 1960, the Government filed a motion to dismiss the appeal, on the ground that it was not timely filed. The motion was granted on April 16, 1960. (Pet. 12.)

## ARGUMENT

The Court of Appeals was correct in holding that a local practice of mailing copies of formal judgments to defense attorneys does not extend the time for taking an appeal in a criminal case, where it is not disputed that the final judgment was docketed more than ten days prior to the filing of the notice of appeal. Rule 37(a)(2) of the Federal Rules of Criminal Procedure, *supra*, p. 2, permits an appeal by a defendant to be "taken within 10 days after entry of the judgment or order appealed from". In *United States* v. *Robinson*, 361 U. S. 220, 228-229, this Court—noting that the steps taken in the drafting of the Federal Rules of Criminal Procedure "almost conclusively * * * show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal" and that Rule 45(b) "says in plain words that '* * * the court may not enlarge * * * the period for taking an appeal' "—held that "the taking of an appeal within the prescribed time is mandatory and jurisdictional." Earlier, in *United States* v. *Hark*, 320 U.S. 531, 534, this Court made it clear

that the right of appeal matured when the "judicial determination or sentence of the court" was made—in that case, as here, where "a formal judgment is signed by the judge." Cf. *United States* v. *Schaefer Brewing Co.*, 356 U. S. 227.

The cases relied upon by the petitioner as establishing a conflict with the present case are inapposite. The petitioner admits that the facts in *Rosenbloom* v. *United States*, 355 U. S. 80, "are different from the facts in this case" (Pet. 7); *Oddo* v. *United States*, 171 F. 2d 854 (C. A. 2); and *Carter* v. *United States*, 168 F. 2d 310 (C. A. 10), as well as the *Rosenbloom* case, involve the official notification provisions of Rule 49(c) of the Federal Rules of Criminal Procedure, applicable only where there has been "an entry of an order made on a written motion".

## CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1960.

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